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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 942

FRANK W. McCULLOCH, CHAIRMAN, AND PHILIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, *Petitioners,*

against

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RESPONDENT'S BRIEF IN REPLY TO PETITIONS FOR CERTIORARI

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Counter Statement of the Case

The statements of this case presented by both Petitioners are deficient. Respondent believes that the Court should be informed of the following pertinent facts.

Empresa Hondurena de Vapores, S. A. (hereinafter referred to as Empresa) is a corporation organized under the laws of Honduras with its principal place of business in Honduras. It owns and operates a fleet of sea-going vessels which are registered under the laws of Honduras and fly the Honduran flag. The unlicensed personnel on board these vessels are composed entirely of Honduran citizens with the exception of one seaman who is a Jamaican citizen. All of the seamen are members of the Honduran Labor Union, Sociedad Nacional de Marineros de Honduras, which is the Respondent in this action. These seamen were hired in Honduras under Shipping Articles executed in Honduras. The Government of Honduras recognizes Respondent Union as the sole collective bargaining agent of the seamen, and a collective bargaining agreement to this effect, is in force between Empresa and Respondent. The ships in question make voyages and carry freight between Central and South American ports, as well as between Central and South American ports and ports of Canada, the United States and Europe.

The National Labor Relations Board (hereinafter referred to as NLRB) on November 15, 1961, rendered a decision pursuant to a petition of the National Maritime Union of America, AFL-CIO (hereinafter referred to as NMU) directing that an election be conducted by the Board among the seamen employed by Empresa to determine whether the seamen desired to be represented for purposes of collective bargaining by the NMU or by "Sindimar," another Honduran Labor Union or by neither.

Following the NLRB's decision, the Honorable Celeo Davila, Ambassador of Honduras, on behalf of the Government of Honduras, promptly submitted to our State Department a formal written protest dated November 29, 1961, in which he objected to the decision on the ground that a treaty between Honduras and the United States provides that mer-

chant vessels under the flag of either of the contracting parties should be deemed to be the vessels of the party whose flag they fly, both within the territorial waters of the other party and on the high seas, and that therefore the Board's decision violated Honduran sovereignty. (For full text of this note see Exhibit 4 to the Complaint.)

On December 16, 1961, Respondent Union brought this action against the members of the National Labor Relations Board in the United States District Court for the District of Columbia to enjoin and restrain them from conducting the election on the ground that, in ordering the election, the NLRB had exceeded its legal authority. A temporary restraining order was issued on the same day. On December 20, 1961, a hearing was held on a motion for preliminary injunction and a motion by the Petitioners to dismiss the complaint for failure to state a claim upon which relief can be granted. Prior to decision on the motions, and pursuant to an invitation of the Court, the Department of Justice submitted a memorandum on January 10, 1962, to the Court which stated in part as follows:

> "The Department of State informs me that, although the Department does not support all of the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

The District Court found that the case of *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U.S. 138 was dispositive of the issue that the Labor Management Relations Act, 1947 (29 U.S.C. 141, et seq.) should be construed as not conferring any authority or power on the NLRB to conduct elections for collective bargaining purposes among foreign seamen, manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law. The District Court went on to say that the

fact that the stock of the corporation that owns the vessels may be owned by an American corporation does not affect this result.

Thereafter, the District Court granted judgment for Respondent Union and made the injunction permanent. The members of the NLRB appealed this judgment to the United States Court of Appeals for the District of Columbia and after the Appeal was docketed therein, filed the instant petition.

The Treaties Involved

The Treaty of Friendship, Commerce and Consular Rights, dated December 7, 1927, 45 stat. 2618, between the United States of America and the Republic of Honduras contains the following pertinent provisions:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties .... shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." (Article X, 45 Stat. 2625)

> "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit." (Article XII, 45 Stat. 2634)

Respondent's Position

It is the position of Respondent Union that the decision of the United States District Court for the District of Columbia is correct in every respect and that it is fully supported by the decisions of this Court in *Benz v. Compania Naviera Hidalgo, S. A.*, *supra*, and in *Marine Cooks v. Panama S.S. Company*, 362 U.S. 365. This decision is further supported by the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras; the position of the Republic of Honduras as expressed in the letter of the Ambassador referred to *supra*, p. 2; and the position of the United States of America as expressed in this case both in the Brief Amicus it filed before the NLRB, *infra*, pp. 8-9, in the proceedings which gave rise to this action, and in its Memorandum to the District Court, *supra*, p. 3.

However, regardless of the foregoing, Respondent does not interpose objections to the granting of certiorari. If the Court grants certiorari, Respondent respectfully suggests that the appropriate questions to be presented and considered are as set forth below.

Questions Presented

The questions presented in this case are whether the NLRB has authority to order that an election for the designation of representatives for purposes of collective bargaining be held among Honduran seamen:

1. Who are already members of and represented by Respondent, a Honduran Union, which is the exclusive bargaining representative of these seamen under Honduran law.

2. Who are all citizens of Honduras except one who is a citizen of Jamaica.

3. Who are employed under a Honduran collective bargaining contract and articles of agreement executed in Honduras.

4. Who work on Honduran registered merchant vessels flying the Honduran flag, owned by a Honduran Corporation the stock of which is owned by an American Corporation, which vessels are time chartered to an American Corporation, and which carry freight between Central and South American ports and between Central and South American ports and ports of Canada, the United States and Europe.

In connection with the foregoing, the Court should also consider the following questions:

1. Whether or not the action of the NLRB which has been enjoined by the District Court:

a. Was unconstitutional because it violated the Treaty of Friendship Commerce and Consular Rights between the United States and Honduras and therefore is contrary to Article 6 of the United States Constitution which declares that treaties under the authority of the United States shall be part of the supreme law of the land;

b. Violated international law and the law of nations recognized by the Constitution of the United States as being a part of the law of the land, by disregarding the universally accepted maxim that laws of the state of registry govern exclusively a ship's internal affairs;

c. Illegally encroached upon the functions and powers of the Department of State of the United States in conducting the foreign affairs of the United States in violation of Section 2 of Article II of the Constitution;

d. Violated Section 8 of Article I of the Constitution by exceeding its jurisdiction under the National Labor Relations Act, since Congress is without power to entrust the NLRB with such authority;

e. Violated the Fifth Amendment to the Constitution by depriving Respondent of its liberty or property without due process of law, in that Respondent, a Honduran union, would be deprived of its liberty to contract, and furthermore, would be deprived of its rights under an existing collective bargaining contract with a Honduran corporation.

The questions presented by petitioners NLRB and NMU are inaccurate and should not be reviewed by this Court.

The Position of the Republic of Honduras

A very clear and concise explanation of the official position of the Republic of Honduras is stated in the Note of September 29, 1961, *supra*, p. 2, from the Ambassador of Honduras to The Secretary of State. That Note states in part as follows:

"My Government has taken notice of this decision (by the NLRB) with very great concern, because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduras registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and the United States, signed at Tegucigalpa, Honduras, on December 7, 1927. . . .

"I want to inform your Excellency the Secretary of State that according to the Labor Law of Honduras 'Codigo de Trabajo de Honduras', Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag. This jurisdiction cannot be renounced

and the Honduras Government can never accept that a foreign Union like the National Maritime Union of America or any other represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor Laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws. . . ."

The Position of The United States

The Position of the Government of the United States as presented to the District Court in the memorandum of January 10, 1962, referred to *supra* p. 3, is further shown by reference to the Government's position before the NLRB in the preceeding which gave rise to this action. For example, in the Brief Amicus, filed by the Department of Justice on behalf of the United States, and at the request of the Department of State and the Department of Defense, with the NLRB (November, 1960 in cases 15-CA-1454, 12-CA-255, 12-RC-415, 2-RC-10379) the Department of Justice stated that a refusal to treat merchant vessels flying the flag of Honduras as Honduran vessels:

> "would be in direct conflict with our treaty obligations, and would . . . create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the rules of international law upon which there had been mutual reliance." (Brief Amicus, p. 11, *supra*, p. 5)

Under the facts in this case, the Department went on to point out that to extend the Labor Management Relations Act to ships flying the flag of Honduras:

> "would have far-reaching effects upon the internal economy of the ships, would displace the labor relations

policies of the flag states as well as labor unions organized under their laws and would prejudice the foreign relations of the United States with these independent nations. In such event, the flag nations involved would consider assumption of jurisdiction by the Board to be an unwarranted intrusion into their own domestic matters." (Brief Amicus, p. 12, *supra* p. 5.

In addition, the following pertinent points were made in the above-noted brief:

1. Congress did not intend the Labor Management Relations Act to govern the internal labor relations of a foreign ship and its foreign crew;

2. If a corporation organized under the laws of a foreign nation owns or operates a foreign flag vessel, manned by a foreign crew, its identification as a foreign vessel seems established, although the holders of stock in the corporation may be American in whole or in part.

In view of the foregoing, the position of the United States is unequivocally clear.

Conclusion

In the event that this Court grants certiorari, the questions to be reviewed should be as hereinbefore stated.

Respectfully submitted,

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